IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
GREENVILLE DIVISION

EVA GREER, INDIVIDUALLY AND AS
NEXT FRIEND OF SHANDA NASH, A MINOR,

Plaintiff,

v. No.4:95CV115-S-B

WILLIAM A. TAYLOR, III AND
TAYLOR TRANSPORTS,

Defendants.

OPINION DENYING PLAINTIFF'S MOTION FOR NEW TRIAL

This cause is before the court upon the plaintiff's motion for a new trial following a jury verdict for the defendant. For the reasons stated below, the plaintiff's motion is denied. The plaintiff asserted as grounds in her motion for a new trial that (1) the jury's verdict was contrary to the overwhelming weight of credible evidence, (2) the jury's verdict was influenced by bias, prejudice, or passion, (3) the plaintiff was prejudiced by the exclusion of jurors Wilbert Robinson and Sharon Hill for cause, and (4) the jury panel selection process violates the Jury Selection and Service Act. 28 U.S.C. §1861, et seq.

An eight-member jury unanimously found for the defendant in this negligence action for which the issue at trial was whether the plaintiff's or the defendant's negligence resulted in a January 3, 1995 automobile accident. The jury panel consisted of four white females, one black female, one black male and two white males. When she filed her motion for a new trial, the plaintiff sought a twenty-day extension in which to file her required memorandum supporting the same. On the same day, she also filed a separate motion for an extension of time to file supporting affidavits and

memorandum with regard, apparently, to the statutory jury selection claim.[1] Almost two weeks later, the plaintiff filed a motion to amend her complaint to include the name of an additional juror whom she believed to have been wrongly excused for cause. Again, on the same day, the plaintiff filed a "Motion for Authority to Provide Jury Information." On December 3, 1996 this court issued a ruling finding that the plaintiff's request for juror information was too broad. The court said, "The plaintiff may file her supplemental motion specifying the particular information and statistical data/compilations which she needs in support of her motion for new trial. This court will rule on plaintiff's request and authorize the Clerk of this Court to proceed accordingly." The court then granted the plaintiff a thirty-day extension "to supplement and amend, if necessary, her motion for new trial and file the required memorandum of authorities with the supplemented or amended motion." When the plaintiff's thirty-day extension had nearly expired, the plaintiff orally requested a ten-day extension which was granted. Once again, when faced with the deadline for filing her memorandum and documentation, the plaintiff filed yet another motion for an extension of time. Finally, at the conclusion of her fourth extension, the plaintiff filed a memorandum brief to support her motion for a new trial.

STATUTORY CLAIM

In regard to the statutory challenge of the jury composition, the plaintiff now concedes that she is not entitled to relief under the statute. "The statute does not contemplate that a new trial could

[1]The plaintiff needed additional time "to gather jury information from the statistical data on file with the Northern District Court." The court is a little confused as to why the plaintiff would request twenty days in her motion for new trial on the same day in which she requested twenty days to obtain the statistical data.

be granted for a violation of the Act, 'since the only remedy provided is a stay in the proceedings until a jury can be selected in conformity with the statute.'" *Dawson v. Wal-Mart Stores, Inc.*, 978 F.2d 205 (5th Cir. 1992). The method for challenging jury selection on the basis of substantial noncompliance with the Jury Selection and Service Act is set out in 28 U.S.C. §1867. The challenging party is required to move for a stay of proceedings prior to voir dire, 28 U.S.C. §1867(a), and to accompany the motion with a sworn statement of facts which, if true, demonstrate a substantial failure to comply with the Act. 28 U.S.C. §1867(d). While the plaintiff did move for a mistrial prior to the jury selection conference, she did not move for a stay of the proceedings for failure to comply with the jury selection procedures under the Act nor did she file a sworn statement of facts at the time of her oral motion.[2] As stated, the plaintiff concedes that she has no claim under the Act.

DUE PROCESS

Nonetheless, the plaintiff raises a constitutional challenge in regard to the composition of the jury. Although the plaintiff's due process claim is not properly before the court,[3] the oral motion for mistrial arguably could have sufficient constitutional implications. Additionally, confusion regarding the procedure and substance of the two jury selection claims requires clarification. In

[2]The Fifth Circuit strictly enforces both the timeliness and sworn statement requirements of §1867. See *United States v. Kennedy*, 548 F.2d 608, 613 (5th Cir.), *cert. denied*, 434 U.S. 865 (1977) ("This threshold requirement to a successful challenge will make it possible for the judge to review a challenge motion and swiftly dispose of it if it fails, on its face, to state a case for which a remedy could be granted."); *United States v. DeAlba-Conrado*, 481 F.2d 1266 (5th Cir. 1973) (refusal to consider a statutory challenge raised after the empanelling of a jury).

[3]As the defendant correctly points out, the plaintiff failed to raise her due process claim in her motion and instead only raised it in her memorandum brief.

considering this claim, the court makes no ruling as to whether she has, in fact, asserted a cognizable constitutional claim.

Both plaintiff and defendant erroneously followed Eleventh Circuit precedent in determining the procedure employed in bringing a constitutional challenge to the jury composition when, in actuality, Fifth Circuit law would have been the more obvious choice. The source of confusion appears to be §1867(e) of the Jury Selection Act which states that the procedures prescribed in §1867, a pre-voir dire motion along with a sworn statement of facts filed at the time of the motion, are the exclusive means by which a defendant may challenge a jury on the basis of noncompliance with the Act. The Eleventh Circuit interprets §1867(e) as precluding constitutional challenges as to jury composition when the statutory prerequisites are not met. *U.S. v. Green*, 742 F.2d 609 (11th Cir. 1984). By contrast, however, our circuit, the Fifth Circuit, stated in an opinion cited by both the plaintiff and defendant for other propositions that "forfeiture of the statutory claim in no way affects the sanctity of a defendant's due process right to be tried by a jury drawn from a fair cross section of the community." *Dawson v. Wal-Mart Stores, Inc.*, 978 F.2d 205 (citing *U.S. v. Kennedy*, 548 F.2d 608, 613-14).

In her needless attempt to follow Eleventh Circuit law and the statutory prerequisites for a jury challenge,[4] the plaintiff filed an affidavit sworn to by "Joe King," an unknown and unexplained affiant, who swears that he personally contacted the Circuit Clerks of the five counties in the Greenville Division who informed him of the racial composition of voters in their respective

[4]The court concedes that a party's request to access the jury records of the district court would, indeed, require some basis in fact. If such basis in fact is an affidavit analogous to the statement of facts required by the Act, the affidavit would not be held to the timeliness requirement under the Act--at least not in this circuit.

counties. King's next "fact" relates that sixty percent of the voters in the Greenville division are black. The plaintiff argues in her brief that "the subject panel was only thirty-two percent (32%) black." The plaintiff's version of a "statement of facts" along with the supporting argument is indicative of the plaintiff's failure to understand the claims she places before the court in her motion for a new trial. First, the sworn statement of facts should demonstrate to this court systematic exclusion of a particular group from jury pools. Secondly, the challenge is to the procedures utilized in selecting a jury venire, not simply the results evident in an empanelled jury. Thirdly, the factual support should arise not from an isolated jury panel, but, rather, a series of jury venires. A properly filed sworn statement of facts would contain first-hand knowledge by the affiant that would indicate the jury selection procedure in this federal court district is somehow tainted and does not result in a selection *from* (not of) a fair cross section of the community.[5]

The due process clause does not itself guarantee a defendant a randomly selected jury, but simply a jury drawn from a fair cross section of the community. "Although a defendant has no right to a 'petit jury composed in whole or in part of persons of [the defendant's] own race,' he or she does have the right to be tried by a jury whose members are selected by nondiscriminatory criteria." *Powers v. Ohio,* 499 U.S. 400, 404 (1991)(quoting *Strauder v. West Virginia,* 100 U.S. 303, 305 (1880)). "In holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition." *Taylor v. Louisiana,* 419 U.S. 522, 538, (1975), *United States v. Steen,*

[5]The defendant correctly argues that the affidavit is nothing more than hearsay. Accordingly, the motion to strike the affidavit is granted.

55 F.3d 1022, 1030 (5th Cir.), *cert. denied,* 116 S.Ct. 577 (1995).

A claim of denial of this due process right requires a showing that the jury selection process tended to exclude or underrepresent some discernable class of persons and consequently to defeat a fair possibility for obtaining a truly representative cross section. *See United States v. Lopez,* 588 F.2d 450, 451-52 (5th Cir.) (requiring showing that "the exclusion of a particular minority group from jury service is due to some form of intentional discrimination"), *cert. denied,* 442 U.S. 947 (1979); *United States v. Kennedy,* 548 F.2d 608, 614; *United States v. DeAlba-Conrado,* 481 F.2d 1266. In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process. *Duren v. Missouri,* 439 U.S. 357, 364 (1979). In the case at bar, despite this court's indulgence, the plaintiff has failed to provide any evidence tending to show that a pattern of discrimination exists in the venires from which juries are selected. The sole support for her argument--that sixty percent of the voters in the five counties representing the Greenville division are African-Americans--proves nothing more than the elementary conclusion that forty percent of the voters are not African-Americans. Therefore, the due process challenge regarding a fair-cross section of the community in the jury pool is dismissed based on the plaintiff's failure to state a prima facie violation.

GREAT WEIGHT OF EVIDENCE

A court may grant a losing party's motion for a new trial if the jury's verdict is against the

great weight of the evidence. *Conway v. Chemical Leaman Tank Lines, Inc.,* 610 F.2d 360, 363 (5th Cir.1980). "New trials should not be granted on evidentiary grounds unless, at a minimum, the verdict is against the great--not merely the greater--weight of the evidence." *Id.* "Factors militating against new trials in such cases are (1) simplicity of the issues, (2) the degree to which the evidence was in dispute, and (3) the absence of any pernicious or undesirable occurrence at trial." *Id.* "When all three factors are present, [the court's] deference to the jury is reinforced by our confidence in its ability to understand the issues, to evaluate credibility and sort through conflicting testimony, and to act reasonably and fairly in the absence of prejudicial influences." *Shows v. Jamison Bedding, Inc.,* 671 F.2d 927, 931 (5th Cir.1982). As previously stated, the issue at trial was simple negligence in an automobile accident. There were no difficult legal theories for the jury to grapple with nor were the facts outside an ordinary person's understanding. The plaintiff testified that the defendant did not stop at a stop sign. The defendant testified that the plaintiff did not stop at a stop sign. The plaintiff's eye witness directly contradicted the defendant while the defendant's eye witness directly contradicted the plaintiff. The outcome of the trial necessarily relied on credibility determinations.

To support her theory that her evidence "greatly outweighed" the defendant's evidence, the plaintiff offers nothing more than a rehash of the factual disputes presented at trial--almost all of which directly contradict the defendant's evidence. The mere fact that evidence is conflicting is not enough to set aside the verdict and order a new trial. *Dawson v. Wal- Mart Stores, Inc.,* 978 F.2d 205, 208. "Indeed the more sharply the evidence conflicts, the more reluctant the judge should be to substitute his judgment for that of the jury." 11 Charles A. Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice and Procedure §2806 (1995). Certainly the trial at issue presents no reasonable basis for this court to upset the unanimous verdict reached by the jury. The jury made

its credibility determinations and found for the defendant. That the plaintiff is displeased is of no surprise. "All the evidence must be viewed in a light most favorable to the jury's verdict, and that the verdict must be affirmed unless the evidence points so strongly and overwhelmingly in favor of one party that the Court believes that reasonable persons could not arrive at a contrary conclusion." *Dawson v. Wal-Mart Stores, Inc.*, 978 F.2d 205, 208.

BIAS, PREJUDICE AND PASSION

The plaintiff offers no legal support and absolutely no factual support for the proposition that the verdict was the result of bias, prejudice, and passion. Apparently, the plaintiff wishes for this court to glean from its own observations of the bias, prejudice, and passion that influenced the jury. The court agrees that passion existed in this trial; however, the passion was directed toward a twenty-year-old female who will undoubtedly spend the remainder of her life confined to a wheelchair. That the jury was so obviously filled with compassion for the plaintiff, yet found the defendant's version to be the more credible, further enforces this court's refusal to grant a new trial. Accordingly, the plaintiff's claim is dismissed.

EXCLUSION OF JURORS

Finally, the court finds the plaintiff's request for a new trial based on the exclusion of jurors Wilbert Robertson and Sharon Hill to be without merit.[6] Wilbert Robinson was excused for cause

[6]The plaintiff added an additional juror, Maxine Gulley, in her memorandum. If the court were to consider the exclusion of Gulley as a basis for a new trial, the court would find this claim to be without merit as well. The defendant used a peremptory challenge to remove this potential juror based on the fact that Gulley was the plaintiff's supervisor at the time of the plaintiff's accident.

by the court based upon the fact that he knew and worked with the plaintiff's mother, that he resided in the same small community as the plaintiffs, that he knew the plaintiff's eye witness, and that he had heard about the circumstances of the accident prior to trial. A district judge has broad discretion in making determinations of impartiality of potential jurors and his decision will not be disturbed absent a clear abuse of discretion. *United States v. McCord*, 695 F.2d 823, 828 (5th Cir.) *cert. denied* 460 U.S. 1073 (1983).

Juror Sharon Hill was not dismissed for cause as the plaintiff contends. Rather, the defendant exercised a peremptory challenge to remove Hill. Based upon the plaintiff's oral motion for a mistrial and in anticipation of racially charged issues advanced by the plaintiff, the court instructed both parties to explain all peremptory challenges they might exercise in light of *Batson v. Kentucky*, 476 U.S. 79 (1986). At the time of exercising the peremptory challenge, the defendant articulated a race-neutral reason for striking Hill from the panel. In her brief, the plaintiff argues that Hill's removal "opens the door to the exclusion of any and all young, single, black, female mothers in a case of this nature." Her argument leads to the faulty conclusion that there is legal precedent prohibiting the use of peremptory challenges on potential jurors who are similarly situated in circumstances to one of the parties. The plaintiff has failed to state a case regarding the exclusion of jurors.

CONCLUSION

For the reasons stated above, the plaintiff's motion for a new trial is denied. The court further notes that it greatly indulged the plaintiff in her futile attempt to obtain the statistical data needed to support her claim that the jury selection process does not result in a fair-cross section of

the community. Whether the plaintiff seriously misunderstood her claim or whether, as the defendant contends, the plaintiff sought additional time "to fish for court jury selection records in an attempt to provide a basis for this claim" is of little import. The plaintiff's motion is denied. An order will be issued contemporaneously with this opinion.

SO ORDERED; This the _____ day of May, 1997.

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Chief Judge